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ATTORNEY FOR ROSENDO FLORES-BERNAL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA
(HON. BARRY T. MOSKOWITZ)

UNITED STATES OF AMERICA, Plaintiff, vs. ROSENDO FLORES-BERNAL, Defendant.	Case No. 08-CR- 1910-BTM NOTICE OF MOTION AND MOTIONS TO: 1) COMPEL DISCOVERY/PRESERVE EVIDNCE; 2) JOINDER WITH MOTIONS OF CODEFENDANT; 3) GRANT LEAVE TO FILE FURTHER MOTIONS Date: July 25, 2008 Time: 1:30 p.m. Judge: Hon. Barry T. Moskowitz

TO: HONORABLE BARRY T MOSKOWITZ, U.S. DISTRICT COURT JUDGE, SOUTHERN DISTRICT OF CALIFORNIA; U.S. ATTORNEY'S OFFICE, U.S. ATTORNEY KAREN HEWITT, ASSISTANT U.S. ATTORNEY PAUL STARITA:

PLEASE TAKE NOTICE that on July 25, 2008, at 1:30 p.m. or as soon thereafter as counsel can be heard, Defendant Rosendo Flores-Bernal, by and through his attorney, Jack J. Boltax, will ask this Court to enter an order granting the following motions.

MOTIONS

Defendant Rosendo Flores-Bernal, by and through is attorney, Jack J. Boltax, moves this Court pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law, and local rules for an order to:

1) Compel Diescovery/Preserve Evidence;

2) Joinder with Motions of Co-Defendant; and

3) Grant Leave to File Further Motions.

These motions are based upon the instant motions and notices of motions, the attached statement of facts and memorandum of points and authorities, the files and records in the above-captioned matter, and any and all materials that may come to this Court's attention prior to or during the hearings of these motions.

Date: July 7, 2008 Respectfully submitted,

/s Jack J. Boltax
JACK J. BOLTAX
Attorney for Defendant
ROSENDO FLORES-BERNAL

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ATTORNEY FOR ROSENDO FLORES-BERNAL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA
(HON. BARRY T. MOSKOWITZ)

UNITED STATES OF AMERICA, Plaintiff, vs. ROSENDO FLORES-BERNAL, Defendant.	Case No. 08-CR- 1910-BTM STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS Date: July 25, 2008 Time: 1:30 p.m. Judge: Hon. Barry T. Moskowitz

I.

STATEMENT OF ALLEGED FACTS

The following Statement of Alleged Facts is based on factual allegations as contained the Statement of Facts attached the underlying complaint (Mag. Case No. 08MJ8480) in the case at bar.

On May 24, 2008 at 8:40 a.m., U.S. Border Patrol Agents received information that a vehicle crossed the U.S./Mexico Border west of the Calexico Port of Entry. Agents subsequently located a pickup driving through the desert in an area frequented by smugglers, heading northbound from the border area. Customs and Border Protection Pilots R. Rhoden and B. Baker began surveilling and following this vehicle when it reached highway 98. A check on the vehicle's registration showed it had no current owner.

The vehicle began traveling at a “high rate of speed.” CBP agents J. Vera and J. Benavides began following this vehicle in their unmarked car. They observed the vehicle run through several stop signs and red lights.

The vehicle eventually reached the outskirts of Brawley. Brawley Police began following the vehicle. The vehicle eventually came to a stop at Brawley Airport. Mr. Rosendo-Flores and codefendant Gonzalez ran from the vehicle. They were quickly apprehended by agents Vera and Benavides. The other occupants of the vehicle were identified as undocumented Mexican nationals. All were taken to the El Centro Border Patrol Station.

Agents subsequently identified Mr. Flores-Bernal as the driver of the vehicle and the codefendant as the front seat passenger.

Material witness Monserrat Corona-Morales and Mariojose Cornoa-Morales admitted to being in the U.S. illegally. They identified Mr. Flores-Bernal as the driver of the loaded vehicle they were smuggled in. Codefendant Gonzalez was identified as giving Mr. Flores-Bernal directions on how to drive and yelling at him to keep going and not stop during their transport.

Mr. Flores-Bernal was Mirandized and interviewed with Custom Border Patrol Agents. Flores admitted to making arrangements for being smuggled into the U.S. He did not have the money to pay the smuggler. In lieu of payment, he arranged to drive the load vehicle.

Codefendant Gonzalez was also Mirandized and interviewed by Customs and Border Patrol Agents. He admitted to helping Mr. Flores-Bernal smuggle the undocumented Mexican nationals into the U.S.

II.

MOTION TO COMPEL DISCOVERY AND PRESERVE EVIDENCE

Mr. Rosendo Flores-Bernal, by and through his attorney, Jack J. Boltax, moves for the production by the government of the following discovery and for the preservation of evidence. This request is not limited to those items about which the prosecutor knows, but includes all discovery listed below that is in the custody, control, care, or knowledge of any government agency. See generally Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989).

1. The Defendant's Statements. The Government must disclose to Mr. Flores-Bernal all copies of any written or recorded statements made by him; the substance of any statements he made which the Government intends to offer in evidence at trial; any response by him to interrogation; the substance of any oral statements which the Government intends to introduce at trial and any written summaries of his oral statements contained in the handwritten notes of the Government agent; any response to any Miranda warnings which may have been given to him; and any other statements by him. Fed. R. Crim. P. 16(a)(1)(A) and (B). The Advisory Committee Notes and the 1991 amendments to Rule 16 make clear that the Government must reveal all the defendant's statements, whether

oral or written, regardless of whether the government intends to make any use of those statements.

2. Arrest Reports, Notes and Dispatch Tapes. The defense also specifically requests that all arrest reports, notes and dispatch or any other tapes that relate to the circumstances surrounding his arrest or any questioning, if such reports have not already been produced in their entirety, be turned over to him. This request includes, but is not limited to, any rough notes, records, reports, transcripts or other documents in which statements of Mr. Flores-Bernal or the codefendant or any other discoverable material is contained. This is all discoverable under Fed. R. Crim. P. 16(a)(1)(A) and (B) and Brady v. Maryland, 373 U.S. 83 (1963). See also Loux v. United States, 389 F.2d 911 (9th Cir. 1968). Arrest reports, investigator's notes, memos from arresting officers, dispatch tapes, sworn statements, and prosecution reports pertaining to the defendant are available under Fed. R. Crim. P. 16(a)(1)(A) and (B), Fed. R. Crim. P. 26.2 and 12(I). Preservation of rough notes is requested, whether or not the government deems them discoverable. This request includes but is not limited to any and all written and/or recorded statements of material witnesses, Mariojose Corona-Morles, Monserrat Corona-Morales, and/or Berencia Cabrera-Guerrero.

3. Brady Material. Mr. Flores-Bernal requests all documents, statements, agents' reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the government's case. Impeachment and exculpatory evidence both fall within Brady's definition of evidence favorable to the accused. United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97(1976).

4. Any Information That May Result in a Lower Sentence. As discussed above, any information which may result in a more favorable sentence must also be disclosed pursuant to Brady v. Maryland, 373 U.S. 83 (1963). The Government must disclose any cooperation or attempted cooperation by the defendant, as well as any information that could affect any base offense level or specific offense characteristic under Chapter Two of the Guidelines. Also included in this request is any information relevant to a Chapter Three adjustment, a determination of Mr. Flores-Bernal's criminal history, or any other application of the Guidelines.

5. The Defendant's Prior Record. Evidence of a prior record is available under Fed. R. Crim. P. 16(a)(1)(D). Counsel specifically requests a complete copy of any criminal record.

6. Any Proposed 404(b) Evidence. Evidence of prior similar acts is discoverable under Fed. R. Crim. P. 16(a)(1)(D) and Fed. R. Evid. 404(b) and 609. In addition, under Fed. R. Evid. 404(b), "upon request of the accused, the prosecution … shall provide reasonable notice in advance of trial … of the general nature…" of any evidence the government proposes to introduce under Fed. R. Evid. 404(b) at trial. Sufficient notice requires the government to "articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence." United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982) (emphasis added; internal citations omitted); see also United States v. Brooke, 4 F.3d 1480, 1483 (9th Cir. 1993) (reaffirming Mehrmanesh and reversing convictions).

This includes any "TECS" records (records of prior border crossings) that the Government intends to introduce at trial, whether in its case-in-chief, impeachment, or rebuttal. Although there is nothing intrinsically improper about prior border crossings, they are nonetheless subject to 404(b), as they are "other acts" evidence that the government must produce before trial. United States v. Vega, 188 F.3d 1150, 1154-1155 (9th Cir. 1999).

Mr. Flores-Bernal requests that such notice be given three weeks before trial to give the defense time to adequately investigate and prepare for trial.

7. Evidence Seized. Evidence seized as a result of any search, either warrantless or with a warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)(E).

8. Request for Preservation of Evidence. The defense specifically requests that all dispatch

tapes or any other physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relate to the arrest or the events leading to the arrest in this case be preserved. This request includes, but is not limited to the results of any fingerprint analysis, the vehicle involved in the case, Mr. Flores-Bernal's personal effects, the codefendant's personal effects, and any evidence seized from Mr. Flores-Bernal, the codefendant, or any third party. This request also includes any material or percipient witnesses who might be deported or otherwise likely to become unavailable (e.g. undocumented aliens and transients).

It is requested that the prosecutor be ordered to question all the agencies and individuals involved in the prosecution and investigation of this case to determine if such evidence exists, and if it does exist, to inform those parties to preserve any such evidence.

9. Henthorn Material. Mr. Flores-Bernal requests that the Assistant United States Attorney ("AUSA") assigned to this case oversee (not personally conduct) a review of all personnel files of each agent involved in the present case for impeachment material. See Kyles v. Whitley, 514 U.S. 437, 438 (1995) (holding that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). This request includes, but is not limited to, any complaints filed (by a member of the public, by another agent, or any other person) against the agent, whether or not the investigating authority has taken any action, as well as any matter for which a disciplinary review was undertaken, whether or not any disciplinary action was ultimately recommended. Mr. Flores-Bernal further requests production of any such information at least one week prior to the motion hearing and two weeks prior to trial. If the prosecutor is uncertain whether certain information should be disclosed pursuant to this request, this information should be produced to the Court in advance of the motion hearing and the trial for an in camera inspection.

10. Tangible Objects. Mr. Flores-Bernal requests the opportunity to inspect, copy, and test, as necessary, all other documents and tangible objects, including photographs, books, papers, documents, telephone/cell phones and records thereof, fingerprint analyses, vehicles, or copies of portions thereof, which are material to the defense or intended for use in the government's case-in-chief or were obtained from or belong to the defendant. Fed. R. Crim. P. 16(a)(1)(E). Specifically,

the defendant requests copies of all photographs in the government's possession of the alleged narcotics and the vehicle in which the narcotics were found.

11. Expert Witnesses. The defense requests the name, qualifications, and a written summary of the testimony of any person that the government intends to call as an expert witness during its case in chief. Fed. R. Crim. P. 16(a)(1)(G). This summary should include a description of the witness' opinion(s), as well as the bases and the reasons for the opinion(s). See United States v. Duvall, 272 F.3d 825 (7th Cir. 2001) (finding that government's written expert notice did not adequately summarize or describe police detective's testimony in drug prosecution where notice provided only a list of the general subject matters to be covered and failed to identify what opinion the expert would offer on those subjects). This request includes, but is not limited to, disclosure of the qualifications of any government witness who will testify that he understands and/or speaks Spanish, French or any other foreign language that may have been used during the course of an interview with the defendant or any other witness.

The defense requests the notice of expert testimony be provided at a minimum of three weeks prior to trial so that the defense can properly prepare to address and respond to this testimony, including obtaining its own expert and/or investigating the opinions, credentials of the government's expert and obtain a hearing in advance of trial to determine the admissibility of qualifications of any expert. See Kumho v. Carmichael Tire Co., 526 U.S. 137, 119 S.Ct. 1167, 1176 (1999) (trial judge is "gatekeeper" and must determine, reliability and relevancy of expert testimony and such determinations may require "special briefing or other proceedings").

12. Impeachment Evidence. Mr. Flores-Bernal requests any evidence that any prospective government witness has engaged in any criminal act whether or not resulting in a conviction and whether any witness has made a statement favorable to the defendant. See Fed. R. Evid. 608, 609 and 613. Such evidence is discoverable under Brady v. Maryland. See United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988) (witness' prior record); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965) (evidence that detracts from a witness' credibility).

13. Evidence of Criminal Investigation of Any Government Witness. The defense requests any evidence that any prospective witness is under investigation by federal, state or local authorities

for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir. 1985).

14. Evidence of Bias or Motive to Lie. The defense requests any evidence that any prospective government witness is biased or prejudiced against the defendant, or has a motive to falsify or distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987); United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988).

15. Evidence Affecting Perception, Recollection, Ability to Communicate, or Veracity. Mr. Flores-Bernal requests any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective witness's ability to perceive, remember, communicate, or tell the truth is impaired; and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic. United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988); Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980).

16. Witness Addresses. The defense requests the name and last known address of each prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United States v. Tucker, 716 F.2d 576 (9th Cir. 1983) (failure to interview government witnesses by counsel is ineffective); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir. 1979) (defense has equal right to talk to witnesses). Mr. Flores-Bernal also requests the name and last known address of every witness to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will not be called as a government witness. United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984).

17. Name of Witnesses Favorable to the Defendant. Mr. Flores-Bernal requests the name of any witness who made any arguably favorable statement concerning the defendant or who could not identify him or who was unsure of his identity, or participation in the crime charged. Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis v. North Carolina, 637 F.2d 213, 223 (4th Cir. 1980); Jones v. Jago, 575 F.2d 1164,1168 (6th Cir.1978); Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979), cert. denied, 444 U.S. 1086 (1980).

18. Statements Relevant to the Defense. Mr. Flores-Bernal requests disclosure of any statement that may be "relevant to any possible defense or contention" that he might assert. United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982). This includes Grand Jury transcripts which are

relevant to the defense motion to dismiss the indictment.

19. Jencks Act Material. The defendant requests production in advance of the motion hearing or trial of all material, including dispatch tapes, which the government must produce pursuant to the Jencks Act, 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2. A verbal acknowledgment that "rough" notes constitute an accurate account of the witness' interview is sufficient for the report or notes to qualify as a statement under section 3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963); see also United States v. Boshell, 952 F.2d 1101 (9th Cir. 1991) (holding that interview notes constitutes Jencks material when an agent reviews notes with the subject of the interview); see also United States v. Riley, 189 F.3d 802, 806-808 (9th Cir. 1999). Advance production will avoid the possibility of delay of the motion hearing or trial to allow the defendant to investigate the Jencks material. Mr. Flores-Bernal requests pre-trial disclosure of such statements to avoid unnecessary recesses and delays and to allow defense counsel to prepare for, and use properly any Jencks statements during cross-examination.

20. Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150 (1972), the defense requests all statements and/or promises, expressed or implied, made to any government witnesses, in exchange for their testimony in this case, and all other information which could arguably be used for the impeachment of any government witnesses.

21. Agreements Between the Government and Witnesses. Mr. Flores-Bernal requests discovery regarding any express or implicit promise, understanding, offer of immunity, of past, present, or future compensation, or any other kind of agreement or understanding, including any implicit understanding relating to criminal or civil income tax, forfeiture or fine liability, between any prospective government witness and the government (federal, state and/or local). This request also includes any discussion with a potential witness about or advice concerning any immigration benefits, any contemplated prosecution, or any possible plea bargain, even if no bargain was made or the advice not followed.

22. Informants and Cooperating Witnesses. Mr. Flores-Bernal requests disclosure of the names and addresses of all informants or cooperating witnesses used or to be used in this case, and in particular, disclosure of any informant who was a percipient witness in this case or otherwise

participated in the crime charged against the defendant. The government must disclose the informant's identity and location, as well as disclose the existence of any other percipient witness unknown or unknowable to the defense. Roviaro v. United States, 353 U.S. 52, 61-62 (1957). The government must disclose any information derived from informants which exculpates or tends to exculpate the defendant.

23. Bias by Informants or Cooperating Witnesses. The defense requests disclosure of any information indicating bias on the part of any informant or cooperating witness. Giglio v. United States, 405 U.S. 150 (1972). Such information would include what, if any, inducements, favors, payments or threats were made to the witness to secure cooperation with the authorities.

24. Personnel Records of Government Officers Involved in the Arrest. Mr. Flores-Bernal requests all citizen complaints and other related internal affairs documents involving any of the immigration officers or other law enforcement officers who were involved in the investigation, arrest and interrogation of Defendant. See Pitchess v. Superior Court, 11 Cal. 3d 531, 539 (1974). Because of the sensitive nature of these documents, defense counsel will be unable to procure them from any other source.

25. Training of Relevant Law Enforcement Officers. Mr. Flores-Bernal requests copies of all written, videotaped or otherwise recorded policies or training instructions or manuals issued by all law enforcement agencies involved in the case (United States Customs Service, Border Patrol, INS, Department of Homeland Security, etc.) to their employees regarding: (a) the handling of vehicles suspected to be transporting illegal aliens across the port of entry or within the United States; (b) the referral to secondary inspection of persons within those vehicles; (c) the detention of individuals within those vehicles; (d) the search of those vehicles and the occupants of those vehicles; (e) the informing of suspects of their Constitutional rights; (f) the questioning of suspects and witnesses. Mr. Flores-Bernal also requests all written or otherwise attainable information regarding the training of Customs agents at ports of entry in California to detect or discover narcotics in vehicles entering the United States, including any training offered to Border Patrol, INS, or officers of Homeland Security Department, by the DEA or other law enforcement agencies or individuals.

26. Performance Goals and Policy Awards. Mr. Flores-Bernal requests disclosure of

information regarding standards used for measuring, compensating or reprimanding the conduct of all law enforcement officers involved in the case (Customs, Border Patrol, INS, etc.) to the extent such information relates to the detection of contraband. This request specifically includes information concerning performance goals, policy awards, and the standards used by Customs for commending, demoting, or promoting agents for their performance at the port of entry and their success or failure to detect illegal narcotics in general.

27. Residual Request. The defense intends by this discovery motion to invoke his rights to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the Constitution and laws of the United States. This request specifically includes all subsections of Rule 16. Mr. Flores-Bernal requests that the government provide him and his attorney with the above requested material sufficiently in advance of trial.

III.

MOTION FOR LEAVE TO FILE FURTHER MOTIONS

Counsel for Mr. Flores-Bernal has received 89 pages of discovery. However, counsel believes that there is still discovery outstanding. Therefore, Mr. Flores-Bernal requests leave to file further motions as may be necessary upon receipt and review of additional discovery.

IV.

MOTION FOR JOINDER IN MOTIONS OF CODEFENDANT

To date, the codefendant has not filed any motions in this case. However, Mr. Flores-Bernal requests that this court all him to join in any and all motions that the codefendant files.

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V.

CONCLUSION

For the foregoing reasons, Mr. Flores-Bernal respectfully requests that the Court grant the above motion.

Date: July 7, 2008 Respectfully submitted,

/s Jack J. Boltax
JACK J. BOLTAX
Attorney for Defendant
ROSENDO FLORES-BERNAL

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ATTORNEY FOR ROSENDO FLORES-BERNAL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA
(HON. BARRY T. MOSKOWITZ)

UNITED STATES OF AMERICA, Plaintiff, vs. ROSENDO FLORES-BERNAL, Defendant.	Case No. 08-CR- 1910-BTM PROOF OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Jack J. Boltax, am a citizen of the United States, and I am at least eighteen years of age. My business address is 1202 Kettner Blvd., Suite 6200, San Diego, California 92101. I am not a party to the above-entitled action.

I hereby certify that I have served:

1) Notice of Motion and Motions to: 1) Compel Discovery/Preserve Evidence; 2) Joinder with Motions of Codefendants; 3) Grant Leave to File Further Motions.

2) Statement of Facts and Memorandum of Points and Authorities in Support of Motion.

to the following CM/ECF participants in this case:

Paul Starita, paul.starita@usdoj.gov;

Carolyn Oliver, coliver1@san.rr.com.

There are no non-ECF participants on this case to be notified by United States Parcel Service.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 7, 2008 Respectfully submitted,

/s Jack J. Boltax
JACK J. BOLTAX
Attorney for Defendant
ROSENDO FLORES-BERNAL